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CPLR 3101(a)(4): To Force Disclosure of Information Possessed by a Nonparty Witness, the Litigant Must Show that the Sought After Information is Unavailable Elsewhere

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so "knowingly and intelligently" in order to effectively waive his right to counsel.[31] This requirement for a valid waiver is necessary to assure that a criminal defendant appreciates the risks of proceeding *pro se*.[32] As Justice Lawrence pointed out in his dissent, the defendant's statement that he would proceed with the suppression hearing clearly was not made "knowingly and intelligently"[33] and, therefore, did not meet the requirements for a valid waiver of counsel.

The *Jones* court's reliance on the *Speller* decision by-passed the opportunity to correct a dangerous precedent in New York law. In addition, if the court had reversed Jones' convictions, a message would have been sent out to trial courts that the Appellate Division refuses to condone such constitutional violations, thereby deterring future transgressions of the right to counsel. It is urged that by refusing to apply a per se rule of reversal, the *Jones* court has paved the way for the future use of harmless-error analysis to situations where it is clearly inapplicable.

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CIVIL PRACTICE LAW AND RULES

CPLR 3101(a)(4): To force disclosure of information possessed by a nonparty witness, the litigant must show that the sought after

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[31] People v. McIntyre, 36 N.Y.2d 10, 17, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844 (1974); *see also* People v. Williams, 96 App. Div. 2d 740, 740, 465 N.Y.S.2d 332, 334 (4th Dep't 1983) (court must determine whether defendant's decision to represent himself was "knowing and intelligent"). Several statutory provisions authorize the court to permit a defendant to proceed *pro se* "if it is satisfied that [the defendant] made such a decision with knowledge of the significance thereof." *See* CPL § 170.10(6) (information or misdemeanor complaint), § 180.10(5) (felony complaint), § 210.15(5) (indictment) (McKinney 1982).

[32] *See* People v. Sawyer, 57 N.Y.2d 12, 21, 438 N.E.2d 1133, 1138, 453 N.Y.S.2d 418, 423 (1982), *cert. denied*, 459 U.S. 1178 (1983). The *Sawyer* court stated that prior to allowing the defendant to proceed *pro se* the court should "undertake a sufficiently 'searching inquiry' of the defendant to be reasonably certain that the 'dangers and disadvantages' of giving up the fundamental right to counsel have been impressed on the defendant." *Id.* (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

[33] *See supra* note 18 and accompanying text.

information is unavailable elsewhere

The primary purpose of Article 31 of the CPLR is to ensure maximum disclosure of pretrial facts with minimum judicial supervision.[1] To this end, section 3101(a) of the CPLR requires full disclosure of all "material and necessary" evidence.[2] Subsection (4),

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[1] *See* First Report of Temporary Commission on the Courts, Leg. Doc. [1957] No. 6[b] at 122 [hereinafter First Rep.]; *cf.* O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 532, 523 N.E.2d 277, 282, 528 N.Y.S.2d 1, 6 (1988) (Bellacosa, J., concurring) ("As is evident from the language of CPLR 3101, civil discovery is meant to be generous and sweeping"). In Rios v. Donovan, 21 App. Div. 2d 409, 411, 250 N.Y.S.2d 818, 820 (1st Dep't 1964), the court observed:

> The disclosure provisions of article 31 of the [CPLR] were intended to enlarge the permissible use of pretrial procedure. The purpose of disclosure procedures is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits. . . . [T]he [CPLR] "shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding . . . ."

Id. (quoting CPLR 104).

[2] CPLR 3101(a) (McKinney 1970). Section 3101(a) provides: "Generally. There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action . . . ." *Id.* The key words, " 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial . . . . [and t]he test is one of usefulness and reason." Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d. 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 452 (1968).

The drafters of CPLR 3101(a) rejected the advisory committee's proposal to require full disclosure of all "relevant evidence and all information reasonably calculated to lead to relevant evidence." *See* First Rep., *supra* note 1, at 117. However, the broad interpretation accorded the present language of the CPLR makes the outcome synonymous with the committee's proposal. *See Allen*, 21 N.Y.2d at 406-07, 235 N.E.2d at 432, 288 N.Y.S.2d at 452 ("CPLR 3101(subd. [a]) should be construed . . . to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable' " (quoting 3 WK&M ¶ 3101.07, at 31-33)); CPLR 3101, commentary at 5 (McKinney 1970) (" 'relevant', is the meaning assigned to 'material'. . . that which is 'relevant' to the litigation is for that reason alone 'necessary' to it"); 3A WK&M ¶ 3101.07, at 31-19 (1988) ("we believe that a broad interpretation of the words 'material and necessary' is proper"); *see also* Shutt v. Pooley, 43 App. Div. 2d 59, 60, 349 N.Y.S.2d 839, 842 (3d Dep't 1973) (entitlement to disclosure extends to any information bearing on controversy); Nomako v. Ashton, 20 App. Div. 2d 331, 333, 247 N.Y.S.2d 230, 232 (1st Dep't 1964) ("The new enactment starts with the assumption of full disclosure"); Venable v. Brockett, 69 Misc. 2d 726, 727, 330 N.Y.S.2d 604, 606 (Sup. Ct. Rensselaer County 1972) (matter may be necessary within meaning of CPLR 3101(a) even though prima facie case can be made without it).

The word "evidence" is also construed liberally to allow disclosure of any information that could lead to admissible evidence. *See Shutt*, 43 App. Div. 2d at 60, 349 N.Y.S.2d at 840; Matter of Comstock, 21 App. Div. 2d 843, 844, 250 N.Y.S.2d 753, 755 (4th Dep't 1964); H. WACHTELL & T. MIRVIS, NEW YORK PRACTICE UNDER THE CPLR 371-72 (6th ed. 1986); 3A WK&M ¶ 3101.04 at 31-14. To ensure that the legislative intent is unambiguous, the Advisory Committee on Civil Practice has introduced a modified measure to CPLR Article 31 which would permit disclosure of a material and necessary "matter." Comm. Rep. Session Laws, June 1988, *reprinted in* [1988] N.Y. Laws 2333 (McKinney). "This measure would amend Article 31 . . . to ensure (1) liberalization of disclosure and (2) reduction of motion

however, restricts a party's ability to obtain discovery information from a nonparty absent a showing of "special circumstances."[3] Prior to its 1984 amendment,[4] the "special circumstances" requirement was deemed satisfied whenever an attorney, by motion,[5] demonstrated that such nonparty evidence was necessary to "prepare fully for trial."[6] Although the standard was quite liberal when the evidence was unattainable elsewhere, the motion would be de-

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practice by more informal procedures." *Id.*

[3] *See* CPLR 3101(a)(4) (McKinney Supp. 1989). CPLR 3101(a)(4) provides that there will be full disclosure by "any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." *Id.*

[4] Ch. 294, § 2, [1984] N.Y. Laws 482 (McKinney). CPLR 3101(a)(4) previously stated that a nonparty was deposable "where the court on motion determine[d] that there [were] adequate special circumstances." CPLR 3101(a)(4) (McKinney 1970)(amended 1984).

[5] CPLR 3101(a)(4) (McKinney 1970)(amended 1984). Courts were divided over whether the pre-amendment language required a court order to proceed with nonparty disclosure. *Compare* Kurzman v. Burger, 98 Misc. 2d 244, 245-46, 413 N.Y.S.2d 609, 610 (Sup. Ct. N.Y. County 1979) (court order required) *with* McNulty v. McNulty, 81 App. Div. 2d 581, 581, 437 N.Y.S.2d 438, 439 (2d Dep't 1981) (no need for court order) *and* Bush Homes Inc. v. Franklin Nat'l Bank of Long Island, 61 Misc. 2d 495, 496, 305 N.Y.S.2d 646, 648 (Sup. Ct. Nassau County 1969) (same). However, the 1984 amendment to the statute relaxed the procedural aspects of nonparty disclosure. *See* CPLR 3101(a)(4) (McKinney Supp. 1989); *supra* note 3. By replacing the word "motion" with "notice" the framers of the 1984 amendment made it clear that a court order is not required in seeking a nonparty deposition. *See* Slabakis v. Drizin, 107 App. Div. 2d 45, 48, 485 N.Y.S.2d 270, 272 (1st Dep't 1985); CPLR 3101, commentary at 18 (McKinney Supp. 1989) ("court order is not required in advance of taking the deposition of a nonparty witness").

[6] *See* Kenford Co. v. County of Erie, 41 App. Div. 2d 586, 586, 340 N.Y.S.2d 300, 302 (4th Dep't 1973). Professor Siegel favored this liberal standard in his commentaries. *See* CPLR 3101, commentary at 39 (McKinney Supp. 1989). The *Kenford* standard has clearly become "the most frequently applied" by New York courts. *See* 3A WK&M ¶ 3101.33a, at 31-117 to -118 (1988). Every other department of the Appellate Division has adopted this standard. *See* Kelly v. Shafiroff, 80 App. Div. 2d 601, 602, 436 N.Y.S.2d 44, 45 (2d Dep't 1981); Catskill Center for Conservation & Dev., Inc. v. Voss, 70 App. Div. 2d 753, 754, 416 N.Y.S.2d 881, 883 (3d Dep't 1979); Villano v. Conde Nast Publications, Inc., 46 App. Div. 2d 118, 120, 361 N.Y.S.2d 351, 353 (1st Dep't 1974).

Prior to the general acceptance of this liberal interpretation of CPLR 3101(a)(4), in order to obtain a deposition from a nonparty witness, the movant had to show that the witness either was hostile or had special knowledge. *See* SIEGEL § 345, at 424 (1978); H. WACHTELL & T. MIRVIS, *supra* note 2, at 369. Hostility was usually found where a witness would not cooperate with an attorney seeking information. *See* SIEGEL § 345, at 424. In addition, proving a relationship between the party and the witness helped to establish hostility. *See, e.g.*, Dimicelli v. Marcellette, 66 Misc. 2d 34, 35, 319 N.Y.S.2d 500, 502 (Sup. Ct. Monroe County 1971) (spouse of plaintiff presumed hostile to defendant). A motion to examine a nonparty witness was also freely granted where that witness possessed exclusive or special information. *See, e.g.*, Sidowsky v. Chat Noir, Inc., 64 App. Div. 2d 697, 698, 407 N.Y.S.2d 562, 563 (2d Dep't 1978) (sole eyewitness to car accident); Pascoe v. Long Island R.R., 44 App. Div. 2d 829, 830, 355 N.Y.S.2d 167, 168 (2d Dep't 1974) (same); Sherwood v. Eli Lilly & Co., 36 App. Div. 2d 533, 533, 318 N.Y.S.2d 636, 638 (2d Dep't 1971) (parents of alleged poison victim had exclusive knowledge of her health history).

nied if the attorney failed to demonstrate that the evidence could not be obtained from some other source.[7] The 1984 amendment clarified some procedural ambiguities and impliedly adopted the judicial interpretation of the special circumstances requirement.[8] However, the special circumstances standard raises the following perplexity which was not addressed by the New York legislature: To what extent must information held by a nonparty be otherwise unavailable before its disclosure shall be deemed "necessary to prepare fully for trial?" Recently, in *Dioguardi v. Saint John's Riverside Hospital*,[9] the Appellate Division, Second Department, held that the deposition of a nonparty witness, here the plaintiff's treating physician, would not be granted absent an affirmative showing by the defendant that the deposition might yield useful information which was not already available from medical records or other sources.[10]

In *Dioguardi*, the plaintiff, John Dioguardi, was treated by the defendant, Saint John's Hospital, for a laceration on his left hand and forearm.[11] After an infection developed, the plaintiff was transferred to Saint Clair's Hospital and treated by Dr. Tulenko.[12] Subsequently, Dioguardi commenced a medical malpractice action against the defendant hospital.[13] To ascertain any additional information that may have been omitted from the medical records of the plaintiff's physician, the defendant served a subpoena and no-

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[7] *See* Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 116-17, 316 N.E.2d 301, 302-03, 359 N.Y.S.2d 1, 3-4 (1974); *see infra* notes 26-28 and accompanying text.

[8] *See Slabakis*, 107 App. Div. 2d at 48, 485 N.Y.S.2d at 272. Each department of the Appellate Division has reaffirmed its pre-amendment determination that special circumstances are present when nonparty disclosure is needed in order to prepare fully for trial. *See* Desai v. Blue Shield of Northwestern N.Y., Inc., 128 App. Div. 2d 1021, 1022, 513 N.Y.S.2d 562, 564 (3d Dep't 1987); New England Mut. Life Ins. Co. v. Kelly, 113 App. Div. 2d 285, 288, 496 N.Y.S.2d 8, 10 (1st Dep't 1985); Mulvihill v. Mutual Benefit Life Ins. Co., 112 App. Div. 2d 762, 762, 492 N.Y.S.2d 263, 263 (4th Dep't 1985); Reilly v. County of Nassau, 112 App. Div. 2d 278, 278, 491 N.Y.S.2d 992, 992 (2d Dep't 1985). Moreover, the pro-disclosure tenor of the 1984 amendment "justif[ies] all the more the conclusion that the liberal construction accorded the 'special circumstances' language of the prior version of paragraph 4 should also be carried forward." CPLR 3101, commentary at 23 (McKinney Supp. 1989); *see also* New York Law Digest No. 304 (April 1985) (standard satisfied on showing that disclosure is needed to prepare fully for trial); 3A WK&M ¶ 3101.33a, at 31-118 (1988) (same).

[9] 144 App. Div. 2d 333, 533 N.Y.S.2d 915 (2d Dep't 1988).

[10] *Id.* at 335, 533 N.Y.S.2d at 916.

[11] *Id.* at 334, 533 N.Y.S.2d at 915.

[12] *Id.*

[13] *Id.*

tice for a deposition upon Dr. Tulenko as a nonparty witness.[14] The Supreme Court, Westchester County, granted plaintiff's motion to quash the subpoena and notice,[15] and denied defendant's cross motion to compel Dr. Tulenko's appearance for deposition.[16] The Appellate Division, Second Department, affirmed, holding that since the defendant could not show that the knowledge possessed by the nonparty witness was more extensive than the information contained in the medical records, the defendant failed to demonstrate the existence of "adequate special circumstances."[17]

Under rule 26(b) of the Federal Rules of Civil Procedure[18] an attorney need show only that the sought after pretrial information is relevant to the pending action[19] and is not requested solely to harass the other litigant.[20] Despite the suggestion by courts and scholars that New York adopt the less restrictive federal discovery rules,[21] the *Dioguardi* court pointed out that the need to show

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[14] *Id.*

[15] *Id.*

[16] *Id.* The trial court has broad discretion in determining the existence of special circumstances. *See* U.S. Pioneer Elecs. Corp. v. Nikko Elec. Corp., 47 N.Y.2d 914, 914, 393 N.E.2d 478, 479, 419 N.Y.S.2d 484, 485 (1979). Even absent an abuse of discretion below, the Appellate Division may still substitute its own discretion for that of the trial court. *See* Phoenix Mut. Life Ins. Co. v. Conway, 11 N.Y.2d 367, 370, 183 N.E.2d 754, 755-56, 229 N.Y.S.2d 740, 742 (1962).

[17] *Dioguardi*, 144 App. Div. 2d at 334, 533 N.Y.S.2d at 915.

[18] FED. R. CIV. P. 26(b). The rule provides: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." *Id.* The only difference between New York's disclosure rules and the federal discovery rules is the special treatment governing nonparty witnesses under CPLR 3101(a)(4). *See* CPLR 3101, commentary at 27 (McKinney 1970).

[19] *See* FED. R. CIV. P. 26(b). In federal court, a litigant is not required to exhaust other means of discovery before taking a deposition. *See* Fraiser v. Twentieth Century-Fox Film Corp., 22 F.R.D. 194, 196 (D. Neb. 1958); *see also* 2 J. MOORE, A. VESTAL & P. KURLAND, MOORE'S MANUAL, FEDERAL PRACTICE AND PROCEDURE § 1502, 15-12 to -13 (1989) (discovery is meant to be cumulative).

[20] *See* FED. R. CIV. P. 26(b). While the rule does not require a showing that the nonparty witness possesses information which is unavailable elsewhere, the party's request for discovery will be denied as excessive if he has had ample opportunity to obtain the information by discovery or if the request is duplicative, expensive or unduly burdensome. *See id.*

[21] *See* Villano v. Conde Nast Publications, Inc., 46 App. Div. 2d 118, 120, 361 N.Y.S.2d 351, 353 (1st Dep't 1974); Kenford Co. v. County of Erie, 41 App. Div. 2d 586, 586, 340 N.Y.S.2d 300, 302 (4th Dep't 1973). While these courts originally proposed the liberal interpretation of the "special circumstances" requirement, in dicta, both advocated the adoption of the federal discovery rules. *See Villano*, 46 App. Div. 2d at 120, 361 N.Y.S.2d at 353; *Kenford*, 41 App. Div. 2d at 586, 340 N.Y.S.2d at 302. Professor Siegel has suggested that disclosure from a nonparty witness under CPLR 3101(a)(4) should be as freely available in New York practice as it is in federal practice. *See* CPLR 3101, commentary at 27 (McKinney 1970).

"special circumstances" survived the 1984 amendment to CPLR 3101(a)(4).[22] It is urged, however, that despite New York's refusal to adopt the federal discovery rules, a more liberal application of CPLR 3101(a)(4) to the special facts of *Dioguardi* is necessary and proper in order to remain faithful to the liberal disclosure policies of Article 31.[23] It is suggested that whenever a plaintiff intends to call his treating physician to testify, a rebuttable presumption should arise that mere disclosure of medical records will not allow the defendant to prepare fully for trial, and thus, under the "special circumstances" standard, a formal deposition of the treating physician is warranted.[24]

In reaching its decision, the *Dioguardi* court relied on *Cirale v. 80 Pine Street Corp.*,[25] where the plaintiff in a wrongful death action was denied access to various documents and reports held by a nonparty investigative committee.[26] The Court of Appeals held that the bare assertion of special circumstances would not suffice, and that the plaintiff, the moving party, had to demonstrate an inability to obtain "sufficient independent evidence" elsewhere before the court would consider a new application for inspection of the committee's report.[27] It is suggested, however, that *Dioguardi*, and other factually similar decisions,[28] misapplied the *Cirale* hold-

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[22] *See Dioguardi*, 144 App. Div. 2d at 334, 533 N.Y.S.2d at 916; *supra* note 8 and accompanying text (change in language of amendment has no effect on substance of special circumstances standard).

[23] *See supra* note 1 and accompanying text.

[24] A rebuttable presumption is one which can be overturned upon the showing of adequate proof. BLACK'S LAW DICTIONARY 1068 (5th ed. 1979). It is submitted that such a presumption would not require the moving party to show lack of special circumstances. *See generally* Commissioner of Social Servs. v. Philip De G., 59 N.Y.2d 137, 140, 450 N.E.2d 681, 682-83, 463 N.Y.S.2d 761, 762-63 (1983) (presumptions shift the burden of producing evidence, not the burden of proof); 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940) (burden of proof never shifts). Rather, it would merely require the plaintiff to adduce some evidence that any information which could be garnered from deposing the nonparty witness is available from other sources. *See generally infra* text accompanying notes 31-34 (application of rebuttable presumption to the facts of *Dioguardi*).

[25] 35 N.Y.2d 113, 316 N.E.2d 301, 359 N.Y.S.2d 1 (1974).

[26] *Id.* at 115-16, 316 N.E.2d at 303, 359 N.Y.S.2d at 3.

[27] *Id.* at 117, 316 N.E.2d at 304, 359 N.Y.S.2d at 4. In *Cirale*, the plaintiff made no showing that his own investigation into the facts and circumstances surrounding the explosion would prove futile. *Id.* at 116-17, 316 N.E.2d at 304, 359 N.Y.S.2d at 3-4. Since access to necessary information was assumed to be available, the plaintiff had to show that such was not the case in order to obtain disclosure from the nonparty. *Id.*

[28] *See, e.g.*, Ferrer v. Horvath, 143 App. Div. 2d 627, 627-28, 533 N.Y.S.2d 7, 7 (2d Dep't 1988); Shapiro v. Levine, 104 App. Div. 2d 800, 801, 479 N.Y.S.2d 1006, 1008 (2d Dep't 1984); Pantaleo v. Sacca, 64 App. Div. 2d 696, 696-97, 407 N.Y.S.2d 560, 561 (2d Dep't

ing. These courts failed to recognize that, typically, only the plaintiff can determine whether the medical record contains all the relevant data because only the plaintiff may depose his treating physician as of right.[29] When one party is in a more advantageous position to bring forth certain evidence, a presumption may be used to compel him to proffer such evidence before his adversary must carry his burden of proof.[30] It is submitted that it is impossible for the defendant to ascertain independently whether the medical record is "sufficient" to prepare fully for trial,[31] without first eliciting a statement from the plaintiff's physician confirming that the latter does not recall any medically relevant acts, occurrences or events other than those in his report.[32] Assuming the plaintiff makes this initial showing to the court, the presumption suggested by this survey would be rebutted,[33] and, as the *Dioguardi* court held, the defendant would be required to demonstrate affirmatively that the deposition is needed to prepare fully for trial. However, if the physician's guarantee is not forthcoming, then a formal deposition would be warranted under the special circumstances standard since the physician is a nonparty witness who possesses exclusive

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1978).

[29] *See* CPLR 3101(a)(3). No showing of materiality or special circumstances is required when a party seeks to depose his or her own physician. CPLR 3101, commentary at 27 (McKinney Supp. 1989).

[30] *See, e.g.*, Rehm v. United States, 183 F. Supp. 157, 160 (E.D.N.Y. 1960) (res ispa loquitur inference of negligence may be drawn if facts or occurrences so warrant and defendant does not sufficiently rebut); Murray v. Paramount Petroleum Prods. Co., 101 Conn. 238, 125 A. 617, 618-19 (1924) (bailee who can not produce bailor's goods is presumed negligent); McIver v. Schwartz, 50 R.I. 68, 145 A. 101, 102 (1929) (employee driving employer's automobile presumed to be acting within scope of employment at time of accident); U.C.C. § 3-307 (1977) (signature on negotiable instrument presumed non-forgery).

[31] *See Cirale*, 35 N.Y.2d at 117, 316 N.E.2d at 304, 359 N.Y.S.2d at 4. In *Cirale*, the court held that plaintiff would have to show lack of sufficient independent evidence in order to gain nonparty disclosure. *Id.*

[32] *See* Williams v. Alexander, 309 N.Y. 283, 287, 129 N.E.2d 417, 419 (1955). As the *Williams* court discussed:

> The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments. Consequently, the only memoranda that may be regarded as within the section's compass are those reflecting acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise "helpful to an understanding to the medical or surgical aspects of . . . [the particular patient's] hospitalization."

Id.

[33] *See* J. PRINCE, RICHARDSON ON EVIDENCE § 58, at 37 (10th ed. 1973). The amount of evidence required to overcome a presumption will vary depending on the issue. *Id.* It is submitted that production to the court of the treating physician's affidavit should suffice in these circumstances.

knowledge of material and necessary information.[34]

The court's interpretation of the special circumstances requirement in *Dioguardi* may result in nondisclosure of facts which are needed by defendants to prepare fully for trial. By placing upon the defendant the burden of showing facts despite the plaintiff's exclusive right to ascertain such evidence, the *Dioguardi* court has narrowed the scope of nonparty disclosure far beyond that intended by CPLR 3101(a)(4). The unique relationship between the plaintiff and his physician requires the more liberal interpretation of the *Cirale* holding suggested in this survey.[35]

Edward G. Kehoe

DOMESTIC RELATIONS LAW

DRL § 236(B): Appellate Division expands Equitable Distribution Law to include educational degrees as marital property subject to equitable distribution

Until 1980, parties involved in a judicially ordered property distribution pursuant to a New York divorce decree were forced to rely on common law rules which frequently resulted in "inequitable" distribution.[1] In response, the New York State Legislature en-

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[34] *See* O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 526, 523 N.E.2d 277, 279, 528 N.Y.S.2d 1, 2 (1988). The *O'Neill* court confirmed the long-held view that special circumstances are present when a nonparty possesses exclusive knowledge of facts which might be material to the case. *Id.*

[35] The First Department has applied the special circumstances standard to facts similar to those in *Dioguardi* and has allowed for the deposition of a nonparty treating physician. *See* Villano v. Conde Nast Publications, Inc., 46 App. Div. 2d 118, 122, 361 N.Y.S.2d 351, 355 (1st Dep't 1974); Names Unlimited, Inc. v. New York Life Ins. Co., 45 App. Div. 2d 696, 697, 357 N.Y.S.2d 72, 73 (1st Dep't 1974). In *Villano*, despite the availability of medical records, the court granted deposition of plaintiff's treating physicians on the assumption that they possessed special and exclusive knowlege which was necessary in order for defendant to prepare fully for trial. *Villano*, 46 App. Div. 2d at 120, 361 N.Y.S.2d at 353. In *Names Unlimited*, the analysis was the same. *See Names Unlimited*, 45 App. Div. 2d at 697, 357 N.Y.S.2d at 73.

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[1] *See* DRL § 236(B), commentary at 140 (McKinney 1986). Prior to the passage of New York's Equitable Distribution Law, courts were required to award property to the spouse who held title, regardless of any contributions by the other spouse in acquiring the property.